**HIGH COURT OF UTTARANCHAL AT NAINITAL**

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32 (2)(b)

Description of the Case.

**IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL**

**Criminal Appeal NO. 725 of 2001**
(Old No. 836 of 1984)

Sher Singh & others .....Appellants

Versus

State ....Respondent.

Approved for reporting.

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~~Not approved for reporting~~

Date of Decision 16th December, 2004

Initial of Judge .

**HIGH COURT OF UTTARANCHAL AT NAINITAL**

**Criminal Appeal No. 725 of 2001**
(Old No. 836 of 1984)

1. Sher Singh S/o Genda Ram
2. Anand Swarup S/o Genda Ram
3. Chandrapal S/o Sher Singh
4. Dharam Singh S/o Balak Ram
   All resident of Village Harlalpur,
   P.S. Bazpur, District Nainital ….Appellants

**Versus**

State ….Respondent.

Sri Dharamveer learned counsel for the appellant,
Sri A. Rab learned A.G.A. for the State assisted by Rajeev Mohan.

**Coram: Hon'ble P.C. Verma, J.**
**Hon'ble B.C. Kandpal, J.**

(Delivered by Hon'ble B.C. Kandpal, J.)

1. This criminal appeal arises out against the judgment and order dated 14.03.1984 passed by Additional Sessions Judge (Special Judge), Nainital in Session Trial No. 139 of 1982, State versus Sher Singh & others convicting the accused/appellants under Sections 148, 302/149 and 307/149 I.P.C. and sentencing them to 2 (two) years rigorous imprisonment under Section 148 I.P.C. , rigorous imprisonment for life under Section 302/149 I.P.C. and to undergo rigorous imprisonment for a period of four years under Section 307/149 I.P.C.

2. During the trial one of the accused Puran Singh died, therefore, the case against him abated but the trial continued against the other appellants, namely, Sher Singh, Anand Swarup, Chandarapal and Dharam Singh who have filed this appeal.

3. Brief facts of the prosecution case are that Sher Singh and Anand Swarup are real brothers and the sons of one Gainda Ram. Chandrapal (accused) is the son of the accused Sher Singh and the accused Dharam Singh is their relative. About 3 - 3 ½ years back the gun of Gainda Ram was stolen and in that case Ram Kumar S/o Kanhai Singh – complainant and other were named as accused. The accused used to bear enmity against Ram Kumar and Ram Ratan on this point.

4. On 30.05.1982 at about 9:00 p.m. Kanhai Singh-complainant along with his sons Ram Kumar and Ram Ratan (now deceased) had gone to village Harlalpur to attend the marriage of the sister of Rampal. In the marriage all the five accused came from north side of the house of Rampal, having weapons like knives, Ballam, lathies on their hands. All these accused started beating Ram Ratan and Ram Kumar with these weapons. The accused persons, namely, Sher Singh and Anand Swarup gave knife blows to Ram Kumar and Ram Ratan with the result of that Ram Ratan died on the spot and Ram Kumar was severely injured.

5. Kanhai Singh got a report (Ex.Ka.1) written by one Tilak Raj and lodged it at the police station Bazpur. On the basis of the said report, the First Information Report (Ex.Ka.3) was written by the then head Moharrir, Police Station Bazpur. The investigation was entrusted to M.P. Juyal – Sub- inspector, P.S. Bazpur. He recorded the statement of the witnesses and prepared the site plan (Ex.Ka.8) of the place of occurrence. On 31.05.1982, he prepared the inquest report (Ex.Ka.6) and other connected documents.

6. M.P. Juyal – Sub- inspector sent the injured Ram Kumar to the Government Hospital, Bazpur for medical examination

through Jiwan Singh – Constable. Thereafter, the injured Ram Kumar was medically examined by Dr. R.S. Gokhle. Dr. R.S. Gokhlte- Medical Officer, Government Hospital, Bazpur performed the medical examination on the body of the injured on 31.05.1982 at 2.00 p.m. and found following ante mortem injuries on his person:-

*"1. Incised wound 3cm X 0.5 cm X 1cm deep on the back on left side about 6cm below the lip of scapula and about 4 cm away from midline.*

*2. Incised would 3cm X 1 cm deep. The probe could not be introduced further as it could injure the lung. Air coming out from this would during respiration. Wound was on back just below the tip of right scapula.*

*3. 2 Incised would 2 cm X 0.05cm X 1cm deep. The probe could not be introduced further as it could have damaged the lung. Air was coming out of wound during respiration. The wound was on the mid line on back between wound no. 1 and 2.*

*4. Incised wound 3cm X 0.5cm X 0.5cm X 3cm deep. On probing the wound was on the back on right side about 13cm from exilla and 3cm away from mid line on right side. Air was coming out from the would on respiration. There was fresh bleeding from all the above wounds from no. 1 to 4.*

*5. Incised would 4cm X 1cm X 1cm deep. Margins were tapering. Wound was broad in the middle. Wound was on the fore head about 7cm above the left eye brow."*

The doctor opined in his medical report that the injuries nos. 1 to 4 could have been caused by a knife and injury no.5 by a ballam. He also opined that the injuries were so grievous and severe. He has also mentioned in his medical report that if

proper first aid would not have been given to the injured it was very likely that he would have succumbed to those injuries.

7. After the inquest on the dead body of the deceased Ram Ratan, he sent the dead body of Ram Ratan for post mortem through Tota Ram – Constable. On 31.05.1982 at 4:30 p.m. Dr. R.P. Rastogi, Superintendent, L.D. Bhatt Hospital, Kashipur conducted the post mortem on the dead body of the deceased. He found the following ante mortem injury on the person of the deceased:-

> *"Incised would 3cm X ½ cm chest cavity deep on inner end left clavicle."*

According to the opinion of the doctor the death was caused due to shock and haemorrhage.

8. After submission of the chargesheet the accused/appellants were committed to the Court of Sessions and the learned Additional Sessions Judge (Special Judge), Nainital on 08.12.1982 framed the charge under Section 148, 302/149 and 307/149 of the Indian Penal Code against them. All the accused denied of the charge levelled against them and claimed their trial.

9. The prosecution in order to support its case produced Kanhai Singh (P.W.1), Jai Ram (P.W.2), Dr. R.S. Gokhle (P.W.3), Rampal (P.W.4), Shyam Lal (P.W.5), Sri Abdul Gani - S.I. (P.W.6), Munni Lal (P.W.8), Tota Ram – Constable (P.W.9), Dr. R.P. Rastogi (P.W.10), Ram Kumar – Injured (P.W.11), M.P. Juyal – Investigating Officer (P.W.12).

10. After the evidence of the prosecution was over, the statements of the accused/appellant and other co-accused were recorded under Section 313 of the Criminal Procedure Code.

The accused persons did not adduce any evidence in their defence.

11. The learned trial court, after hearing learned counsel for the parties and having perused the entire evidence on record convicted the accused under Section 148, 302/149 and 307/149 of I.P.C. and thereon sentenced them to undergo 2 (two) years rigorous imprisonment under Section 148 I.P.C., rigorous imprisonment for life under Section 302/149 I.P.C. and to undergo rigorous imprisonment for a period of 4 (four) years under Section 307/149 I.P.C. vide judgment and order dated 14.03.1984.

12. Feeling aggrieved by the impugned judgment and order dated 14.05.1984, the convicts preferred the appeal before the Allahabad High Court, which has been transferred, to this court after creation of new State of Uttaranchal.

13. We have heard the learned counsel for the parties and perused the record.

14. Learned counsel for the appellants has argued that the F.I.R. in the present case is anti timed. It has been submitted that on this basis of the evidence adduced by the prosecution, it does not appeal to the reasons that the F.I.R. would have been lodged by the informant Kanhai Singh at the alleged time i.e. 11:00 p.m. in the night of 30.05.1982.

15. P.W. 1 Kanhai Singh is the informant. He is father of injured Ram Kumar and father in law of deceased Ram Ratan. As per his version, the incident is alleged to have taken place at about 9:00 p.m. on 30.05.1982 in village Harlalpur. After the incident, the informant scribed the report at the spot and

Thereafter he took the written report to the Police Station and lodged the same at about 11:00 p.m. From the record, the distance of the Police Station from the place of occurrence appears to be about 4 kms.

16. It is now to be seen by the help of the other evidence produced by the prosecution that the F.I.R. was infact lodged by the informant at the alleged time i.e. 11:00 p.m. The first important thing in this regard is medical examination report pertaining to the injured Ram Kumar. As per the record, Ram Kumar has been medically examined at P.S. Bajpur in the night at 2:00 a.m. on 31.05.1982. Dr. R.S. Gokhle P.W. 3 has medically examined Ram Kumar and he has deposed that he examined him on 31.05.1982 at 2:00 a.m. It appears to be quite strange that in case if the incident had taken place at 9:00 p.m. on 30.05.1982 then why this delay has occurred in the medical examination of Ram Kumar who is alleged to have suffered serious injuries on his persons during the course of the occurrence.

17. As per the deposition of P.W. 1 Kanhai Singh, Ram Kumar was taken to the hospital by the other persons assembled at the spot. P.W. 4 Ram Pal is also an eyewitness and he has stated that the villagers took Ram Pal to the hospital after about half an hour of the occurrence. He has stated that Ram Pal was taken to the hospital on the Dunlop trolley with tractor of Dalip Singh. He has specially stated that Ram Pal had been taken to the hospital before the arrival of the police. Therefore, in case if the eyewitnesses account is taken into consideration, then it appears to be quite improbable that why Ram Pal could be medically examined after about five hours of the occurrence. Either the witness account is not trustworthy in this regard or it appears that the incident has taken place otherwise as has been

alleged by the prosecution. The medical examination report of Ram Kumar on 31.05.1982 at 2:00 a.m. in the hospital Bajpur creates a doubt about lodging the F.I.R. at the Police Station at the time as has been alleged by the prosecution.

18. Further, in case if the F.I.R. is delayed even then it does not adversely affected the prosecution case unless the prosecution story suffers with the serious set back.

19. In the instant case, the ocular version advanced by the prosecution is to be assessed and scrutinized very carefully in order to reach to a definite conclusion as to whether the accused/appellants really participated in the crime and as to whether the ocular version produced by the prosecution is trustworthy or not.

20. We again advert to the medical examination of the injured Ram Kumar and perusal of evidence shows that as per the deposition of P.W. 2 Jai Ram, Ram Kumar injured was taken to the hospital by he police in the next morning after the sun rise. P.W. 5 Shyam Lal an eyewitness has also stated that after the arrival of police at the spot, Ram Kumar was taken to the hospital by the police. This witness has stated that till the police reached at the spot Ram Kumar was not given any treatment. P.W. 12 M.P. Juyal is the Investigating Officer and he has also deposed that he had seen Ram Kumar in an injured condition at the spot and he instructed Jivan Singh to take him to hospital and get his dying declaration recorded by the Doctor, keeping in view his serious condition. Therefore, the contradiction in the statements of the witnesses with regard to the medical facility provided to injured Ram Kumar at the alleged time too i.e. 2:00 a.m. appears to be doubtful. In case, if it is considered to be true that Ram Kumar was medically

examined by the Doctor at 2:00 a.m. on 31.05.1982 then the deposition of the eyewitnesses produced by the prosecution suffer with material contradiction and embellishment. P.W. 1 Kanhai Singh, father of injured Ram Kumar was not taken to the hospital immediately from the place of occurrence. Therefore, in view of the major contradiction in the statements of the eyewitnesses, the prosecution story gets a serious jolt and the genesis of the prosecution case appears to be doubtful.

21. It is further important to mention here that the eyewitnesses account produced by the prosecution does not appear to be trustworthy in the instant case in view of the material contradiction in their depositions before the Court pertaining to the manner of incident. P.W. 1 Kanhai Singh is an eyewitness and he has stated that his vision is quite weak and he could hardly see the things in the night. He has against stated that he saw the accused persons from a distance of about 150 paces. He has again deposed that the assailants had concealed their faces with “dhate”. This specific question was put to this witness as to what portion of the faces of the assailants were concealed with “dhate” then he has given the reply that some portion of the face was not visible. He has also deposed that head of the assailants were concealed. Therefore, in view of the deposition of this witness, it cannot be said that this witness had actually identified the actual assailants at the time of occurrence. His testimony with regard to the involvement of accused/appellants in this crime appears to be doubtful.

22. P.W. 4 Ram Pal is also an eyewitness and this witness is very important and material witness as the marriage ceremony of his sister was being solemnized on the date and at the time of the occurrence. This witness has stated that when he reached

at the spot, he saw the accused alongwith arms running away from the place of occurrence. He has specifically stated that he could not see the accused persons assaulting the deceased and the injured. Therefore, this witness is also supporting the prosecution case halfheartedly and on the basis of his deposition, it cannot be conclusively decided that this witness had actually an occasion to witness the actual occurrence of Marpeet.

23. The prosecution has also produced P.W. 2 Jai Ram and P.W. 5 Shyam Lal as eyewitnesses of the occurrence. Both the witnesses are the chance witnesses. Jai Ram is a resident of village Kishanpur, P.S. Suar, Distt. Rampur. He has stated that he had come in the marriage ceremony at the house of Ram Pal. But this witness has stated that at the time of Marpeet Baratis had already gone. He has stated that when the Marpeet took place then the sleeping arrangement was being made for the Baratis at the house of one Munni Lal. The deposition of this witness finds material contradiction with the deposition of another witness P.W. 5 Shyam Lal who is also a chance witness as he is resident of village K
akragha, P.S. Shehzad Nagar, Distt. Rampur. This witness has stated that he had come to the house of Ram Pal in order to attend the marriage and this witness has stated that at the time of Marpeet the Barati were present at the house of Ram Pal and Tilak was being performed. Therefore, two witnesses, their presence at the place of occurrence appears to be doubtful.

24. Again the ocular version adduced by the prosecution finds a serious jolt as the same is not corroborated with the medical version at all. As per the P.W. 2 Jai Ram, the accused/appellants Sher Singh and Anand Swarup were armed

with knives and Dharam Singh, assailant was armed lathi and rest two persons were armed with spears while P.W. 4 Ram Pal deposed before the Court that accused Anand Swarup and Ram Singh armed with knifes, accused Puran Singh armed with spear and accused Dharam Singh armed with lathi and accused Chandrapal armed with a gun. In this context, P.W. 1 Kanhai Singh has deposed that accused Anand Swarup and Ram Singh had knives with them but he could not see as to other assailants were armed with which weapons. Again P.W. 5 Shyam Lal has deposed that Sher Singh and Anand Swarup were armed with knives in their hands and Puran Singh and Chandrapal having spears and Dharam Singh having lathi with him. As per the ocular version, all the assailants had assaulted Ram Kumar and Ram Ratan with their respective weapons. P.W. 1 Kanhai Singh has deposed that all the assailants had assaulted with their respective weapons at Ram Ratan and Ram Kumar. Likewise, P.W. 2 Jai Ram has corroborated the deposition of P.W. 1 P.W. 4 Ram Pal has of course deposed that he could not see the assailants assaulting at Ram Ratan and Ram Pal with their weapons but saw all the accused running from the place of occurrence. P.W. 5 Shyam Lal specifically deposed that all the accused/appellants had been assaulting the Ram Kumar and Ram Ratan with their respective weapon.

25. It is to be observed here that all the eyewitnesses have given different version with regard to the arms, which were in the hands of the assailants at the time of the occurrence. In case, if the version of P.W. 4 Rampal is taken into account then it appears he has deposed that one of the accused/appellants Chander Pal was having a gun with him. Therefore, it does not appeal to reasons that when one of the assailants was having gun with him then the assailants could have easily used the gun

for assault at the time of the occurrence and there was no reason with the other assailants to use knife and lathies for assault.

26. The ocular version as has been stated above does not find corroboration with the medical version at all. The post mortem report on the body of the deceased Ram Ratan shows that there was only one incised wound on his person. P.W. 10 Dr. R.P. Rastogi has deposed that this injury has been caused either by knife or by spear, therefore, in view of the deposition of the Doctor, it cannot be said that as to which of the accused persons should be attributed to the specific role giving the fatal blow to Ram Ratan. The prosecution has come with the case that all the accused persons had been assaulting Ram Kumar and Ram Ratan. It is worthy to mention here that Ram Ratan did not suffer any other injury which could have been caused by the lathi. Therefore, the ocular version with regard to the role attributed to all the accused persons does not appear to be creditworthy. P.W. 2 Jai Ram has stated that accused/appellant Sher Singh assaulted two knife blows on the chest of Ram Kumar but again has deposed that he assaulted two knife blows on the persons of Ram Ratan. He has also stated that the assailant who was having lathi with him was also assaulting with his lathi. Therefore, the deposition of the eyewitnesses is not corroborated with the medical version at all.

27. Likewise, the injury report of Ram Kumar shows that he suffered 5 incised wounds on his person and from the deposition of the Dr. P.W. 3 R.S. Gokhle, these injuries could have been caused either by knife or by spear. The injury report of Ram Kumar no where indicates that he suffered any lacerated would which could have been caused by use of lathi. Again, therefore, it is concluded that the medical version is not corroborated by the ocular version.

28. The most important feature in this case is the statement of P.W. 11 Ram Kumar who has sustained injuries during the course of the occurrence. Injured Ram Kumar has deposed that the accused/appellants were having knife, spear and lathi with them and all these accused persons assaulted Ram Ratan with knife, spear and lathi but the evidence of this witness does not find corroboration with the medical version as there is no lathi injury on the person of the deceased Ram Ratan. This witness has again stated that he was assaulted by Sher Singh and Anand Swarup with knives but this statement does not find corroboration with the deposition of other eyewitnesses as other eyewitnesses have stated that all the accused/appellants assaulted with their respective weapon at Ram Ratan and Ram Kumar. Again the prosecution case on the basis of deposition of Ram Kumar finds a serious jolt as Ram Kumar in his cross examination stated that all the accused persons assaulted both of them, i.e. Ram Ratan and Ram Kumar with their respective weapon.

29. The prosecution has emphatically stressed on this aspect of the matter that there was a dying declaration of injured Ram Kumar recorded by the Dr. R.S. Gokhle when he was medically examined at P.H.C. Bajpur. P.W. 3 R. S. Gokhle has deposed that the condition of Ram Kumar was precarious and in case if he would not have been provided the immediate treatment, he could have collapsed. He has also deposed in cross examination that he recorded the dying declaration of injured Ram Kumar keeping in view of his serious condition but it is surprising to note that this alleged dying declaration which could have been the best piece of evidence has not been produced by the prosecution. The Investigating Officer stated that he sent constable Jivan Singh with the injured to hospital

for his medical treatment with a direction that his dying declaration should also be recorded by the Doctor concerned. The Investigating Officer M.P. Juyal has stated that he tried to obtain the dying declaration from the Doctor but Doctor informed him that he had already sent that statement to the Court. The Investigating Officer has further deposed that he tried to obtain the said dying declaration/statement from the Court but he could not obtain the same. The suggestion has been made by the defence to the Investigating Officer that the injured Ram Kumar did not mention the name of any of the assailants accused/appellants in his so called dying declaration. Therefore it has been suppressed.

30. The deposition of the Investigating officer reveals that Dr. P.W. 3 R. S. Gokhle recorded the dying declaration/ statement of the injured Ram Kumar. It is also evident from the statement of Dr. R.S. Gokhle that he recorded the statement of the injured Ram Kumar when he medically examined him.

31. The copy of the aforesaid statement has not been made available to the defence. Hence, it is quite clear that the statement of the injured recorded by the Doctor could not be made available to the accused/appellants for cross examination as the same was not traceable. In our opinion, the appellants had a right to cross examined the witness with reference to his previous statements.

32. Section 145 Evidence Act gives a party a right to cross examine a witness with reference to his previous statements made by him in writing or reduced to writing and impose a duty on the cross examiner. In case he intends to contradict him with such previous statement, to draw the attention of the witnesses to such portion thereof as are to be used for the

purpose of contradiction. Section 155 (3) of the Evidence Act permits a cross examiner to impeach the credit of a witness by proving a former statement inconsistent with any part of his evidence. Thus it is apparent that it was a legitimate right of the appellants to defend themselves by proving if they could, that the prosecution witness, on the basis of whose statements the charge of murder was sought to be proved against them, had made different statements on previous occasions. By denying the copies of he previous statements this previous right has been taken away from them. They have thus, to a great extent, been handicapped in their defence on account of non-availability of the earlier statement.

33. Therefore either the story of prosecution with regard to the alleged dying declaration / statement of the injured recorded by the Doctor appears to be completely doubtful or it is presumed that the injured might not have given a real picture about the manner of incident in his statement as has been alleged by prosecution.

34. The deposition of P.W. 11 Ram Kumar who is a star witness as he is alleged to have sustained injuries during the course of the occurrence, does not appear to be creditworthy in view of the important fact that his statement was not recorded by the Investigating Officer till the submission of chargesheet P.W. 12 M.P. Jual has deposed that during the investigation he tried to search injured Ram Kumar but he has not made any mention to this fact in his case diary. He has admitted that till the submission of the chargesheet, i.e. 16.06.1982 he did not record the statement of the injured Ram Kumar. The Investigating Office has not offered any proper explanation as to why he could not record the statement of the injured witness. The delay in questioning the material witness by the Investigating Officer is a serious mistake on the part of the

prosecution. The prosecution has also not offered any satisfactory explanation as to injured Ram Kumar was in such a precarious condition that he was not able to give statement till the submission of chargesheet. On the other hand, statement of Ram Kumar which is alleged to have recorded after submission of charge sheet reveals that he could get consciousness on the third day at Bajpur Hospital. He has also deposed that S.I. took his statement by calling him at police station after 15 to 20 days. In case, if the injured witness could get his consciousness after three days of the occurrence then it is quite strange as to why his statement was not recorded by the Investigating Officer till the submission of the chargesheet. The only inference which can be drawn under these circumstance that the injured witness was not supporting the prosecution case at all. The suggestion made by the defence to the Investigating Officer before the trial Court that the so called statement of injured Ram Kumar recorded by the Doctor was suppressed only on this account that Ram Kumar was not supporting the prosecution case in his statement carries some weight.

35. Another import point in this case is the source of light available at the place of occurrence. As per the ocular version, the petromax were available at the place of the occurrence and the incident was seen by the witness in the light of the pertomax but again there are contradictions on this point. Some of the witnesses have stated that the petromax belonging to Barati and they had taken it away with them. Therefore, under these circumstances, it is quite probable that the witnesses had no occasion to see the real culprit at the time of occurrence. P.W. 12 Investigating Officer, M.P. Juyal has deposed in his statement that when he reached a the spot then he saw that there was not sufficient light therefore, he could not prepare the inquest in the night. He has stated that the light of torch and

petromax were available but the light was not sufficient for preparing the papers and the inquest report. The I.O. has stated that he does not know that the gas lantern which was found at the spot belong to whom. It is pertinent to mention here that the Investigation Officer has not taken any lantern or gas lantern in his possession and has not prepared any memo in this regard. No source of light either lantern or gas lantern have been shown by the Investigating Officer in the site plan also. Therefore, we come to the conclusion that there was no sufficient light available at the place of occurrence and the eyewitnesses present over there had not sufficient opportunity to identify the faces of the actual assailants.

36. We have already observed that the eyewitnesses account produced by the prosecution does not inspire confidence. It is again reiterated here that the conduct of the eyewitnesses do not appear to be trustworthy as none of the eyewitnesses have made any attempt to save the deceased and the injured. As per the ocular version, the marriage was going to be solemnized at the place of the occurrence and under these circumstances, there must be a large gathering but none of the person at the Barat or from the side of bride came forward to save the deceased or the injured. P.W. 1 Kanhai Singh is the father of the injured Ram Kumar and father in law of the deceased Ram Ratan but he has also not made any attempt to save the deceased and the injured who were his son in law and his son respectively. This conduct of P.W. 1 Kanhai Singh does not appear to be natural and his testimony on this account does not appear to be credence worthy.

37. In view of the assessment of evidence on record, we come to the conclusion that the conviction and sentence thereon passed by the trial Court against the accused/appellants is liable

to be set aside. We are of the view that the prosecution could not establish the guilt of the accused/appellants beyond reasonable doubt.

38. The impugned judgment and order passed by the trial Court deserves to be set aside.

39. Accordingly the appeal is allowed. The judgment and order dated 14.03.1984 passed by the learned Trial Court convicting and sentencing the accused/appellants is hereby set aside.

**(B.C. Kandpal, J.)** **(P.C. Verma, J.)**

December 16, 2004
Shiv